

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ZHAOHUI WANG D/B/A</b>	:	ORDER
<b>SUNRISE TRADING CORP.</b>	:	DTA NO. 816766
	:	
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period Ended November 1, 1996	:	

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Petitioner, Zhaohui Wang d/b/a/ Sunrise Trading Corp., 63-95 Austin Street, Apt. 2L, Rego Park, New York 11374, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended November 1, 1996.

A hearing was scheduled before Administrative Law Judge Frank Barrie at the offices of the Division of Tax Appeals, New York State Housing Finance Agency, 641 Lexington Avenue, New York, New York on Wednesday, August 25, 1999 at 10:30 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request that the default determination be vacated.

Petitioner, Zhaohui Wang, appeared by Cuilan Xuan. The Division of Taxation (“the Division”) appeared by Barbara G. Billet, Esq. (Andrew Haber, Esq., and Michael Infantino, Esq., of counsel).

Upon a review of the entire case file in this matter, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

***FINDINGS OF FACT***

1. On October 15, 1998, the Division of Tax Appeals received a petition from Zhaohui Wang protesting a Notice of Determination issued by the Division of Taxation which asserted a cigarette tax penalty under Article 20 of the Tax Law for the period ending November 1, 1996. The petition form was signed by Andrew Liu, CPA, who was listed on the petition as petitioner's representative. The petition did not include a power of attorney authorizing Mr. Liu to act on behalf of petitioner.

2. A hearing was scheduled before Administrative Law Judge Frank W. Barrie at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on August 25, 1999 at 10:30 A.M. Neither petitioner nor his representative appeared at the hearing. Instead, Cuilan Xuan, petitioner's mother, appeared on his behalf. Ms. Xuan was given until September 13, 1999 to submit an affidavit of her son establishing that he did not speak English and that his mother should be permitted to represent him. In addition, Ms. Xuan was also given until September 13, 1999 to submit a properly executed power of attorney authorizing Andrew Liu, CPA, to represent petitioner.

3. At the hearing, the Division of Taxation was prepared to go forward on the issue of the timeliness of the petition but not on the merits of the petition. To that end, Andrew Haber, Esq., the Division's attorney, introduced into the record the Division's documents pertaining to the timeliness issue. In the course of reviewing these documents, it was pointed out that petitioner's address was listed incorrectly on the Notice of Determination. As a result, the Notice of Determination had been mailed to the wrong address. Ms. Xuan argued that petitioner had not filed a timely petition because of this mistake with petitioner's address. Petitioner never received the Notice of Determination. The petition was filed in response to a Division of

Taxation collection notice which contained the same incorrect address as the Notice of Determination.

Since it appeared that petitioner would prevail on the timeliness issue because of this mistake, Attorney Haber indicated that he would attempt to resolve this matter after having an opportunity to speak with his supervisor. Nonetheless, the Division of Taxation moved for an order defaulting petitioner for his failure to appear. As of November 12, 1999, the Division of Tax Appeals had not been notified by the parties of any resolution of the matter, nor had Ms. Xuan provided the affidavit from her son or a new power of attorney. Accordingly, on that date Administrative Law Judge Barrie issued a determination finding petitioner in default for failure to appear at his scheduled hearing.

4. On December 15, 1999, the Division of Tax Appeals received correspondence from petitioner's mother explaining that she had not supplied the requested information because she was waiting to hear from Mr. Haber who had not contacted her. The correspondence included a Notarial Certificate of Birth written in Chinese along with an English translation attesting that Xuan Cuilan is the mother of Zhaohui Wang.

5. On March 6, 2000, petitioner submitted a new petition form signed by petitioner. The portion of the petition which should include allegations by petitioner of the errors made by the Commissioner of Taxation and Finance was left blank. On May 30, 2000, Mr. Haber wrote to point out that petitioner had yet to file a written request to vacate the default or a power of attorney to authorize his mother to act on his behalf. Mr. Haber stated that he would contact petitioner to assist him in accomplishing this task.

6. By letter dated June 27, 2002, Cuilan Xuan submitted a request for another hearing for the instant matter and included a power of attorney signed by petitioner authorizing her to act on

his behalf. By letter dated October 1, 2002, Michael Infantino, Esq., of the Division of Taxation indicated that the Division of Taxation would have no objection to the reopening of this matter upon written proof of an excuse for the default and proof of a meritorious case.

7. Petitioner, Zhaohui Wang, speaks little or no English. His current representative speaks English although English is not her native language.

### ***CONCLUSIONS OF LAW***

A. The original petition filed in this matter contained an explanation of why petitioner was filing his petition and contained sufficient detail that it could be said that the petition stated a cause of action upon which relief could be granted. That copy of the petition was signed by Andrew Liu who was listed as petitioner's representative but who never filed a power of attorney authorizing him to represent petitioner. Petitioner subsequently filed a second copy of his petition which he had signed. However, the portion of the petition which should include allegations of the errors made by the Commissioner of Taxation and Finance was left blank. The two petitions taken together make up one valid petition and will be so deemed for purposes of this proceeding.

B. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.15[b][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.15[b][3].)

C. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law judge correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.15[b][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

D. Because petitioner does not speak English and because he did send his mother to the hearing on his behalf, it seems clear that petitioner's default was not intentional and was not for the purpose of delay or otherwise frustrating the tax appeals process. Petitioner's default was due entirely to a misunderstanding of what was required of him. It is noted that petitioner could have avoided this default by acting promptly after the hearing to correct the deficiencies found in his petition and power of attorney. However, it appears that his failure to act was due to a miscommunication between Ms. Xuan and Mr. Haber whereby each was waiting for the other to act. Accordingly, I find that these misunderstandings establish that reasonable cause exists for petitioner's default.

E. The Division of Taxation has introduced evidence which shows that the Notice of Determination was mailed to the wrong address. Case law in New York establishes that, at the very least, petitioner is entitled to a hearing on the merits (*see, Ruggerite v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517; *see also, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Accordingly, it has been demonstrated that there is merit to petitioner's case at least with respect to the timeliness issue. Moreover, inasmuch as

nothing in the record would indicate that petitioner has ever been furnished with a copy of the Notice of Determination, there remains a question regarding the validity of the notice itself.

F. It is ordered that the request to vacate the default be, and it is hereby, granted and the Default Determination issued November 12, 1999 is vacated.

DATED: Troy, New York  
January 30, 2003

/s/ Andrew F. Marchese  
CHIEF ADMINISTRATIVE LAW JUDGE